No. 14947.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as United States Secretary of State,

Appellant,

vs.

TAM SUEY JIN,

Appellee.

BRIEF FOR APPELLEE.

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Jurisdiction.

This is an appeal from a judgment in favor of plaintiff in an action wherein plaintiff sought to establish her status as a national of the United States. The action was brought pursuant to the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) which provides, in part, as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. . . ." (54 Stat. 1171-1172; 8 U. S. C. 903.)

In her Petition to Establish Nationality of the United States Pursuant to Section 903, Title 8, U. S. C. A. [T. R. 3] appellee alleged, in paragraph I thereof, that she was born in China on April 28, 1941; in paragraph II thereof that she is the legitimate daughter of Tam Tong Gong; that said Tam Tong Gong was a citizen of the United States at the time of plaintiff's birth and has lived and resided in the United States since May 17, 1923; that her father, Tam Tong Gong, resides in Los Angeles, California; that she claims residence in Los Angeles, California, the home of her father; that she is a citizen of the United States [T. R. 3-4]; in paragraphs III and IV thereof that she claims the right and privilege as a citizen of the United States

> "to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that she is not a national of the United States." [T. R. 4-5].

In paragraph V plaintiff alleged that the action is brought in good faith pursuant to the provisions of Section 903, Title 8, U. S. C. A.

In his answer [T. R. 6] defendant denied, on information and belief, the allegations contained in paragraph I of the complaint; denied that Tam Tong Gong was at any time a citizen of the United States, or that he was admitted to the United States, or that he was admitted to the United States at any time as a citizen by the United States Immigration and Naturalization Service, as alleged in paragraph II of the complaint and denied on information and belief all other allegations contained in said paragraph II; denied each and every allegation contained in paragraphs III, IV and V of the complaint and denied that

plaintiff is, or ever has been, a citizen of the United States, or entitled to any rights or privileges as such [T. R. 7].

The complaint herein was filed on December 22, 1952 [T. R. 5], before the repeal of Section 503 of the Nationality Act of 1940 by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952.

Since the judgment of the District Court [T. R. 16-17] was a final decision, this Court has jurisdiction of an appeal from that decision under the provisions of 28 U. S. C. 1291 and 1294(1).

Statutes Involved.

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A. Section 903, provides in part, and insofar as is pertinent to this action, as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States . . ."

Statement of the Case.

Appellant's statement of the case is substantially correct. Appellee contends, however, that with respect to appellant's motion to dismiss, the certified passport file [Pltf. Ex. 1] does not support said motion.

ARGUMENT.

I.

The Issues.

Appellant does not challenge the sufficiency of the evidence to support the findings of fact and conclusions of law that plaintiff is a citizen and national of the United States. He is attacking the judgment solely upon jurisdictional grounds, it being his contention that "the facts do not establish the jurisdictional requirements for an action under section 503 of denial on the ground that appellee is not a United States national."

Appellee concedes that in order to maintain her action under Section 503 of the Nationality Act of 1940, it was incumbent upon her to prove as a jurisdictional requisite that at the time her complaint was filed she had been denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States. It is appellee's contention, however, that the allegations necessary for jurisdiction were alleged in the complaint and were proved at the trial of the action.

II.

The District Court Did Not Err in Denying Appellant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted.

In her complaint plaintiff alleged that she was born on April 28, 1941 in China; that she is the legitimate daughter of a citizen of the United States; that she claims residence in Los Angeles, California, the home of her father; that she claims to be a citizen of the United States and entitled to the rights and privileges of a citizen of the United States; that she had theretofore filed an application for an American passport or other travel document

as a citizen of the United States with the American Consulate General at Hong Kong for the purpose of traveling to the United States to join her father; that the American Consulate General at Hong Kong has refused to issue to plaintiff the passport applied for, thereby denying plaintiff's American citizenship and her rights and privileges as a citizen of the United States; that plaintiff has at all times claimed and now claims the right and privilege as a national of the United States of America to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that the defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that she is not a national of the United States. Such allegations are sufficient to give the court jurisdiction to hear and determine the cause. (*Jew May Lune v. Dulles,* 226 F. 2d 796.)

In *Jew May Lune v. Dulles, supra,* the court stated, at page 798:

> "There were sufficient 'facts' set up in the petition to give the court jurisdiction to hear and determine the cause. It was alleged that her rights were denied upon the ground that she was not a national. Under federal forms of pleading, this is sufficient, and, besides, there were allegations which, if proved, would show she was a national and that there was a refusal to issue a passport. The defendant denied these allegations. This was sufficient basis for jurisdiction. The court was then required to try the matter.
>
> "* * * * * * * *
>
> ". . where allegations have been made which are necessary for jurisdiction, the action will fail if these are not proved. The reservation in 12(h), Federal Rules of Civil Procedure, is for extraneous circumstances, which demonstrates that the court has not

authority to hear and determine. All tribunals in the federal system must at all stages of the proceeding make certain of the possession of power to act. But, where there are allegations of key jurisdictional facts which are controverted, there always exists power to try the issues thus made. Jurisdiction existed to try the questions here."

III.

Finding of Fact IV Is Supported by the Evidence.

The action of a consular officer in denying an application filed by an alleged foreign born son of an American citizen for a passport to the United States is a denial of a claimed right or privilege as a national of the United States upon the ground that he was not a national of the United States, such as would give the federal court jurisdiction to determine nationality status. (*Fong Nai Sun v. Dulles,* 219 F. 2d 269; *Chin Chuck Ming v. Dulles,* 225 F. 2d 849.)

Plaintiff's passport application was executed and filed with the United States Consulate General at Hong Kong on May 6, 1952. The present action was filed December 22, 1952, at which time there had been no formal denial of plaintiff's application for a passport. The court found, however, that the delay in acting upon the application was unreasonable and the failure to act on the application within a reasonable time was a denial of plaintiff's rights and privileges as a national and citizen of the United States.

Webster's New International Dictionary, Second Edition, defines the word "deny" as follows:

"1. To declare not to be true; gainsay, contradict; —opposed to affirm, allow or admit. 2. To refuse

(one who asks). 3. *To refuse to grant; to withhold; to refuse to gratify or yield to;* 4. . . . *to refuse to acknowledge* . . ." (Italics added.)

Clearly by withholding the issuance to appellant of a travel document which would enable her to proceed to the United States, and to which any American citizen is entitled as a matter or right, defendant has in effect denied her such right upon the ground that she is not a citizen of the United States. Upon no other ground could the consul withhold or decline to issue the travel document.

An unreasonable delay in acting upon a passport application is equivalent to a denial thereof (*Chin Chuck Ming v. Dulles, supra.*) Appellant maintains that under the circumstances in the instant case, a delay of seven and a half months in acting upon her passport application was unreasonable and an implied denial thereof.

As was aptly stated by the court in *Nuspel v. Clark,* 83 Fed. Supp. 963, at page 965:

> "Counsel for defendant asserts that this 'holding in abeyance' does not constitute a denial of such rights and privileges. It seems, however, the failure to grant the visa for plaintiff's wife within a reasonable time constitutes a denial of such application equally as much as justice delayed is justice denied."

Over the objection of plaintiff, defendant introduced into evidence "Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong." [Deft. Ex. "C".] Plaintiff maintains that her objection should have been sustained since the evidence is clearly incompetent, irrelevant and immaterial. However, assuming but not conceding that the evidence was admissible, it supports plaintiff's contention that the delay in processing her case was unreasonable. It would

appear from that document that defendant claims that the reasons for the delay in the processing of passport applications were the transfer to the Hong Kong Consulate of 2000 cases and the lack of facilities and personnel to process such cases; that on September 1, 1950, there was a backlog of 3600 cases; that insofar as possible, claims were processed in the chronological order of their initiation;" that in November 1950, the Department

> "assigned a Foreign Service Inspector, two Departmental employees, and fourteen members of the Foreign Service to Hong Kong, and authorized the employment of sufficient local alien personnel to serve as interpreters and give clerical assistance, to work on the backlog of pending citizenship claims in an effort to process them all at the earliest possible date, while continuing to work on the cases still coming in at the rate of approximately 150 a month;"

that by July 1, 1951, the backlog had been reduced to 2100, some 600 of which were not "live;" that from July 1, 1951, to July 1, 1952, 2609 cases were processed and by July 1, 1952, new claims were reduced to 25 per month. It would appear, therefore, that by the middle of 1952, there were only 25 new applications being filed each month and with the additional facilities and personnel, it is obvious that the applications could be acted upon within a seven months period.

As was stated in *Chin Chuck Ming v. Dulles, supra,* at page 852:

> "We construe the words 'right or privilege as a national of the United States' of the first two lines of Section 503 to cover the right to a prompt disposition of a claimed citizens' application . . .
>
> "* * * * * * * *

"Dulles contends that we should take judicial notice of the fact that a large number of similar applications were pending on September 6, 1951 when appellants' was filed and that Congress has not appropriated sufficient funds to give him the qualified personnel at Hong Kong to enable the State Department to dispose of them in the intervening months. He makes no claim that he applied to Congress for such funds. Assuming we can take such judicial notice, we think the right to a prompt consideration of appellants' application cannot be denied them for such a reason."

See also:

Lee Bang Hong v. Acheson, D. C. Hawaii, 110 Fed. Supp. 48, 50;

Lee Hong v. Acheson, D. C. N. D. Cal., 110 Fed. Supp. 60;

Look Yun Lin v. Acheson, D. C. N. D., Cal., 95 Fed. Supp. 583, 584.

Moreover, at the time plaintiff's passport application was filed, she was barely eleven years of age. The passport applications of her two older brothers, Tam Hem Wing and Tam Hem Fook, had just been processed. The application of Tam Hem Wing was filed October 23, 1951. [Pltf. Ex. 2(b).] It was processed with that of his brother and the testimony of plaintiff and her two brothers was taken in March 1952, in connection with those passport applications. A recommendation of denial was made by the Vice Consul on April 30, 1952, and on May 20, 1952, the applicants were advised that they had failed to establish their identity as citizens of the United States and their passport applications were disapproved. Thus, the processing of plaintiff's brothers' applications was com-

pleted in six months and a formal denial made in seven months.

Despite the fact that the Consulate had already investigated the citizenship claims of the family and taken testimony with reference thereto immediately prior to the filing of plaintiff's application, and the further fact that plaintiff was a child of only eleven years of age, no action whatsoever was taken on plaintiff's application prior to the filing of the instant action. Plaintiff had not been called in for an interview nor had she been asked to submit additional evidence. It appears obvious from the report of consular investigation in the passport file [Pltf. Ex. 1] that the application was denied because her two brothers, who were her identifying witnesses, had been refused as not being the persons they claimed to be. There appears to be no reason why such a conclusion could not have been reached within a period of seven months after the application of plaintiff was filed.

In *Yung Jin Teung v. Dulles,* 229 F. 2d 244, at page 246, the court stated:

> "First of all we note that the State Department may have effectively determined the plaintiffs' claim of citizenship adversely even though it took no final official action which explicitly constituted such a determination. Thus a passport may be denied on the statutory ground by a refusal to determine a claim of citizenship for an unreasonable length of time, Chin Chuck Ming v. Dulles, 9 Cir., 1955, 225 F. 2d 849, or by insisting upon the production of evidence of citizenship when it is clear that the applicant cannot produce it. Wong Ark Kit v. Dulles, D. C. D. Mass. 1955, 127 F. Supp. 871; Ow Yeong Yung v. Dulles, D. C. N. D. Cal. 1953, 116 F. Supp. 766. On the other hand if a delay in acting on an appli-

> cation is entirely the fault of the applicant, then such delay would not constitute a denial. Thus where the consul informs the applicant that no decision has been reached and requests certain additional evidence, there may yet be no effective denial if the applicant has neither produced additional evidence nor informed the consul that he will not do so. Ling Share Yee v. Acheson, 3 Cir., 1954, 214 F. 2d 4, certiorari denied 1954, 348 U. S. 873, 75 S. Ct. 109, 99 L. Ed. 687. We must therefore determine whether the papers here show that there had been no explicit adverse determination of the plaintiffs' claim and, further, that there had been no implicit adverse determination within the principle of these decisions."

The court further stated, on page 247:

> ". . . it should be noted that the statute barring suits after December 24, 1952 was passed in June of 1952, thus putting the government on notice that unless it acted in six months applicants might lose their rights to bring action under the statute."

It is submitted that there was ample evidence upon which the trial court find, as it did, that the delay of seven and one-half months in acting upon plaintiff's passport application was unreasonable and that therefore there was an implied denial thereof. The trial court having obtained jurisdiction pursuant to Section 503 of the Nationality Act, the judgment was proper and should be affirmed.

Respectfully submitted,

KATHLEEN PARKER,

Attorney for Appellee.